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**FROM:** Teresa Ross for Derek V. Howard, Esq.

**DATE:** June 29, 2005

**SUBJECT:** Growth Management Litigation Report



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# GROWTH MANAGEMENT LITIGATION REPORT

TO: Board of County Commissioners

Richard Collins
County Attorney

Timothy McGarry
Director, Growth Management Division

Thomas J. Willi
County Administrator

FROM: Derek Howard, Esq.
Morgan & Hendrick

DATE: June 29, 2005

## Vacation Rentals

**Neumont (Federal Class Action)** – Plaintiffs filed a class action suit in U.S. District Court alleging vacation rental ordinance (Ordinance 004-1997) was prematurely enforced, is an unconstitutional taking of their properties, and was adopted in violation of due process. On June 20, 2004, the U.S. District Court entered final judgment in favor of the County. On July 15, 2004, Plaintiffs/Appellants filed a notice of appeal to the U.S. Court of Appeals for the 11th Circuit from final judgment of the District Court, and all interlocutory orders giving rise to the judgment. On September 15, 2004, Appellants filed a motion to certify state-law questions to the Florida Supreme Court and to postpone briefing pending certification; the County filed its response on October 7; Appellants filed a reply on October 15, 2004. On October 18, 2004, a mediation conference was held. On October 19, 2004, the Court denied Appellants' motion to stay briefing and ruled motion to certify state-law questions to the Florida Supreme Court is carried with the case. Appellants filed their initial brief on December 15, 2004. Monroe County filed its response brief on February 22, 2005. Appellants filed their reply brief on March 11, 2005. On April 7, 2005, Monroe County filed a motion for leave to file a surreply brief in response to Appellants' new argument relating to the Class Action Fairness Act of 2005. On April 21, 2005, Appellants filed their response to Monroe County's motion, which included a declaration of a local property manager offered as support for Appellants' assertion that a majority of the subject class members are out-of-state residents. On April 27, 2005, Monroe County filed a motion to strike the declaration, which was denied on May 25, 2005. On May 2, 2005, the Court entered an order granting Monroe County's motion for leave to file a surreply brief; brief was filed on May 24, 2005. Oral argument is tentatively scheduled during the week of October 24, 2005. ($123,471.24 as of May 31, 2005).

## Takings Claims

**Emmert** - Complaint seeking inverse condemnation based on application of Monroe County's wetland regulations. Plaintiffs allege that Monroe County has deprived them of all economic use of their property, despite the fact that they were granted partial beneficial use from the subject regulations, which expanded the buildable area of their vacant Ocean Reef lot from approximately 1,800 to 2,500

square feet. Plaintiffs argue that their ability to build within this area is encumbered by Ocean Reef Club Association deed restrictions requiring setbacks in excess of those required by Monroe County. Monroe County's motion to dismiss was denied on December 12, 2002. Mediation was held on October 21, 2004. Case was set for bench trial on November 29, 2004. On November 22, 2004, Plaintiffs filed an emergency motion for continuance; motion was heard and granted on November 24, 2004. On November 22, 2004, Plaintiffs also filed a motion for leave to file a second amended complaint in order to add a claim of vested rights. The motion was heard on January 5, 2005. On March 10, 2005, the court entered an order granting Plaintiffs' motion for leave to file a second amended complaint, the complaint was filed on March 31, 2005. On March 31, 2005, Plaintiffs also moved for the entry of default judgment against the County for failure to file an answer to the second amended complaint (despite the fact that the second amended complaint was not previously filed); the County moved to strike Plaintiffs' motion on April 4, 2005. The County timely filed its answer to the second amended complaint on April 8, 2005. On May 3, 2005, Plaintiffs filed a motion for partial summary judgment, which is set for hearing on August 3, 2005. The trial has been set for the two (2) week trial period beginning December 19, 2005. ($70,141.73 as of May 31, 2005).

**Galleon Bay –** Three cases: (1) appeal of vested rights decision; (2) takings claim; and (3) third party complaint against the State of Florida seeking contribution, indemnity and subrogation.

(1) On June 17, 2004, the 3rd D.C.A. denied the County's petition for writ of certiorari.

(2) As to the takings claim, Judge Payne entered summary judgment in favor of Plaintiff on November 10, 2003. The order of the court found that a temporary taking began on April 21, 1994, and would cease on the date of the jury verdict, at which time a permanent taking would arise. The case was scheduled to proceed with a jury trial as to damages on August 9, 2004. At the pretrial conference on July 26, 2004, however, Judge Payne agreed to modify his order on liability to find only a permanent taking on April 21, 1994, and granted Plaintiff's request to continue the trial until October 12, 2004. Plaintiff's counsel was delegated the task of reducing the Court's announced ruling to a proposed modified order. On August 18, 2004, Judge Payne entered final judgment in favor of the County as to Plaintiff Hannelore Schleu. On September 24, 2004, the County submitted a proposed modified order consistent with the Court's July 26, 2004, ruling. On October 3, 2004, Plaintiff submitted a proposed modified order that substantively contradicted and strayed from the Court's ruling; namely, the proposed order found that a temporary taking occurred on April 13, 1997. On October 4, 2004, the Court entered verbatim Plaintiff's proposed modified order. The trial was subsequently continued until February 7, 2005.

On November 29, 2004, the County filed an amended motion for rehearing and/or motion for reconsideration arguing, *inter alia*, the verbatim entry of Plaintiff's proposed modified order violated its procedural due process rights. On December 13, 2004, the Court granted the County's motion and vacated the modified order of October 4, 2004. On December 27, 2004, the Court entered its Order for Nonbinding Arbitration.

On May 5-6, 2005, the parties (including Third-Party Defendant State of Florida) participated in nonbinding arbitration before Gerald Kogan, Esq., a former member of the Florida Supreme Court. The issues arbitrated included (1) whether the taking found to have occurred by the trial court was permanent or temporary (or both); (2) the applicable measure of damages for the taking; and (3) whether Monroe County is entitled to a contribution from the State as to all or a portion of the just compensation

that Plaintiff is owed for the taking. The issue of liability was not arbitrated, pursuant to the trial court's arbitration order. On June 3, 2005, Kogan rendered his decision, substantially finding in favor of Monroe County on all of the issues arbitrated. Kogan rejected Plaintiff's "two-takings" theory of recovery, finding that there has only been a permanent taking for which Plaintiff is entitled to the fair market value of the property on the date of the taking, plus simple interest at the statutory rate until the compensation is paid, as just compensation (Plaintiff argued that it was entitled to rebut the statutory rates with other rates of return that it could have achieved through selective investments, and that the rate of return is applied on a compound basis). Kogan also found that Monroe County is entitled to a 50% contribution from the State as to compensation owed to Plaintiff. On June 6, 2005, Plaintiff rejected the arbitrator's proposed award and moved for an order setting the case for trial.

Prior to the arbitration proceeding, Plaintiff filed a motion to amend the summary judgment order of November 10, 2003, and notice of confession of error (seeking to change the taking date of April 21, 1994, to April 13, 1997). Thus, all the parties now agree that there was no taking on April 21, 1994. The State filed its response to Plaintiff's motion to amend on May 18, 2005. The County filed its response to Plaintiff's motion on June 20, 2005. At a hearing on June 21, 2004, the Court denied Plaintiff's motion to amend. Pursuant to the ruling of the Court, the parties will engage in a new round of summary judgment proceedings on the issue of liability as to Plaintiff's allegation that a taking of its property began on April 13, 1997.

(3) As to the third party complaint against the State of Florida, the State moved to dismiss for failure to state a cause of action, as well as a motion to transfer action to the Second Judicial Circuit in and for Leon County, Florida. On May 24, 2004, the court denied the State's motion to dismiss as to the County's claim of contribution, as well as the State's motion to transfer. On May 24, 2004, the State moved to substitute the Department of Community Affairs and the Administration Commission as third party defendants. On July 27, 2004, the State filed a notice of appeal to the 3rd D.C.A. of the non-final order denying the motion to transfer venue and petition for writ of prohibition/certiorari. On August 24, 2004, the Court granted County's motion to hold appeal in abeyance. On August 25, 2004, the Court denied County's motion to hold petition in abeyance. The Court has deferred the deadline for the County to file its response, pending resolution of matters in the underlying action. ($199,295.49 as of May 31, 2005; does not include prior Galleon Bay matters).

**Good** – Plaintiff is seeking declaratory relief and takings claim for ~16 acre Sugarloaf Shores property due to commercial moratorium which began January 4, 1996. Plaintiff is also pursuing administrative requirements for filing a claim under the Bert Harris Act. The County's motion to dismiss is being held in abeyance until Plaintiff obtains a pre-application letter of understanding as to the level of development that is permissible on each parcel of property. Plaintiff and the County staff met on April 26, 2004, to discuss potential development. On February 14, 2005, the parties appeared before the court for a status conference. On February 17, 2005, Plaintiff Lloyd Good again met with County staff to discuss potential development. On March 7, 2005, the County issued a letter on the proposed development of Tracts A and B (property S. of U.S. 1). Planning staff is preparing a letter addressing the development potential of the remaining property at issue (property N. of U.S. 1). A case management conference before the court is expected sometime in July or August. ($15,038.79 as of May 31, 2005).

**Hardin** – Two cases: (1) case filed in federal district court alleging due process violations and inverse condemnation based on code enforcement orders that resulted in a lien on Plaintiffs' property and (2)

appeal of the code enforcement orders to the state circuit court, pursuant to Florida Statute 162.11.

(1) As to the federal case, the district court entered its Order of Final Judgment in favor of Monroe County on August 18, 2003, dismissing Plaintiff's case with prejudice, based on reinstatement of state court appeal of code enforcement orders.

(2) On September 3, 1999, Appellant (a pro se litigant) filed her notice of appeal from the following orders entered by the Code Enforcement Special Master in Case No. L9-98-409: Order Denying Motion for Rehearing, Order Denying Motion For Stay of Fines; and Order Imposing Penalty/Lien (Appellant did not timely or belatedly appeal the Findings of Fact, Conclusions of Law, and Order entered by the Special Master on April 16, 1999, which found Appellant in violation of various provisions of the Monroe County Code relating to building permits and enclosures below the base flood elevation). Appellant filed her Initial Brief on September 22, 1999.

On October 19, 1999, Monroe County filed its motion to dismiss based on various procedural grounds. The Court granted the motion on September 27, 2004. Upon the filing of a motion for rehearing by Appellant, the court entered an order vacating its order granting the County's motion to dismiss and denying the County's motion on November 5, 2004.

The ruling on the County's motion to dismiss of October 19, 1999, was delayed because the Court had previously entered an order sua sponte dismissing the appeal based on the absence of record activity for a period of over one year. The court vacated the order on June 24, 2003. On August 10, 2004, Monroe County filed a motion to dismiss for lack of prosecution, which remains pending.

Monroe County has not filed its Answer Brief because several pending motions of Appellant, including a motion to postpone the proceeding (filed on February 22, 2000) are tolling the time schedule of the proceeding.

On June 27, 2005, a case management conference was held before Judge Miller. The pending motions are set for hearing on August 1, 2005. Monroe County will seek dismissal on the grounds that Appellant has failed to produce a sufficient record to allow the Court to competently dispose of the issues before it, Appellant's failure to diligently pursue the appeal, and other procedural defects. ($6,577.93 as of May 31, 2005).

**Kalan** - Takings claim filed as to residential property in Cahill Pines & Palms subdivision for failure to obtain ROGO allocation in 4 year period. Based on County's motion to dismiss, the parties agreed to entry of an order holding the case in abeyance while Plaintiff seeks a beneficial use determination, as required to exhaust available administrative remedies and ripen the case for judicial review. On June 24, 2004, the Court entered an order requiring the County to render a beneficial use determination as to subject property within 90 days. On September 21, 2004, the Court granted the County's motion for an extension of time, extending the deadline for the County to render a beneficial use determination until January 20, 2005. On October 26, 2004, a beneficial use hearing was held before the Special Master. The County filed another motion to extend the deadline for the rendering of a beneficial use determination, which remains pending. On March 4, 2005, the Special Master rendered a proposed denial of beneficial use, which was adopted by the BOCC on June 15, 2005. ($2,825.77 as of May 31, 2005).

## Other Matters

**Department of Community Affairs v. Monroe County** - Case before Land and Water Adjudicatory Commission in which DCA alleges that the County failed to comply with various Comp Plan requirements by failing to routinely amend endangered species maps, and vegetation surveys as to high & moderate quality hammock areas. DCA also alleges that the County has allowed higher ROGO scores than should have been allocated due to failure to amend maps, thereby allowing more residential development than should have been approved. DCA entered voluntary dismissal pending adoption of moratorium & revised regulations, but moved forward with appeals as to individual permits (see below). ($14,796.42 as of May 31, 2005).

- **Department of Community Affairs v. Monroe County** - Pursuant to 380.07, *Florida Statutes*, DCA appealed the building permit issued by Monroe County to Nancy Suarez-Cannon. DCA alleged that Monroe County did not correctly interpret and apply portions of its Comprehensive Plan and LDRs in scoring the application for development. On February 25, 2004, the ALJ dismissed Respondent Nancy Suarez-Cannon from the case because she sold the three subject lots to DC6, L.L.C.

  On June 13, 2005, DCA and Intervenor DC6, L.L.C. entered into a Stipulated Settlement Agreement, which was approved by the BOCC on June 15, 2005. On June 16, 2005, DCA filed its Notice of Voluntary Dismissal with the Florida Land & Water Adjudicatory Commission. On June 21, 2005, the Commission entered its Final Order of Dismissal. ($1,844.50 as of May 31, 2005).

**O'Daniel and Hills v. Monroe County** - Petitioners filed a vested rights claim in Circuit Court on March 13, 2002. Petitioners also appealed finding of Code Enforcement Special Master that they were conducting a commercial business on the subject, which is in a residential zoning district, without having first obtained a special use permit. The Court affirmed the Special Master's finding and order. The vested rights claim went to bench trial on May 25, 2004. On October 7, 2004, the Court entered its final judgment in favor of Petitioners. The Court held that Appellants/Petitioners have vested rights to maintain a mixed residential/commercial structure on the subject property, and to use the subject property for both residential and commercial office purposes. The relief granted to Petitioners is relatively narrow compared to the relief sought. The Court, for example, held that (1) any application for a change in commercial use is subject to current regulations regarding non-conforming structures and uses, and (2) the commercial portion of the structure must substantially comply with current standard building, electrical, mechanical and plumbing codes before a certificate of occupancy is issued. The Court did not vacate its prior order affirming the Code Enforcement Special Master order.

On November 4, 2004, Petitioners filed motions to tax costs and for attorney's fees pursuant to § 57.105, Fla. Stat. On November 11, 2004, the County filed a motion to strike the motion for attorney's fees for Petitioners' failure to comply with the procedural requirements of § 57.105. On February 9, 2005, the Court entered its order granting the County's motion. On March 7, 2005, Appellants/Petitioners filed a notice of appeal as to the order granting the County's motion to strike. Appellants/Petitioners filed their Initial Brief with the Third District Court of Appeal on June 6, 2005, arguing that § 57.105 is constitutionally infirm because the legislature may not enact rules of court practice and procedure. The

County has moved to defer the deadline for the filing of its Answer Brief until August 1, 2005. ($29,476.72 as of May 31, 2005).

**Industrial Communications & Electronics v. Monroe County** – I.C.E. filed action against Monroe County in federal court alleging wireless tower moratoria violated the Federal Telecommunications Act of 1996 and the Fifth and Fourteenth Amendments to the United States Constitution. The district court granted the county's motion to dismiss on grounds of res judicata/collateral estoppel (claims were identical to those brought in state court action and plaintiff failed to reserve federal claims therein). I.C.E. appealed the decision to the 11th Circuit.

On May 27, 2005, the 11th Circuit vacated the judgment of the district court, but remanded with instruction to dismiss the complaint for lack of jurisdiction. A proposed order was submitted by the County to the district court on June 28, 2005. ($18,736.61 as of May 31, 2005).

**Johnson** - Writ of Mandamus challenging Director of Planning's determination that application for "boundary determination" by alleged error requires zoning map amendment application. Applicant applied for boundary determination based on allegation that BOCC previously adopted change in zoning. Director's determination was based on review of records failing to show any error or prior consideration of such zoning change. Director rejected application and informed owner to properly file for zoning map amendment. (Boundary determination may be placed on BOCC agenda without the public notice required for a zoning change). Pursuant to oral argument, Monroe County agreed to re-process application for denial or approval (application was previously returned as incomplete) and Plaintiffs may appeal as provided by the Monroe County Code if denied. On May 26, 2005, opposing counsel submitted a proposed final judgment for the County's consideration. ($1,889.62 as of May 31, 2005).

**Sierra Club, et al. v. Department of Community Affairs & Miami-Dade County (Monroe County & City of Homestead as Intervenors)** - On October 10, 2002, the Miami-Dade County Board of County Commissioners approved Ordinance No. 02-198, which amends the Land Use Element and Transportation Element of Miami Dade's Comprehensive Growth Management Plan to change the designation of Krome Avenue from a "Minor Roadway" (2 lanes) to a "Major Roadway" (3 or more lanes). On January 10, 2003, Petitioners filed a petition for formal administrative hearing to challenge DCA's finding that this and other amendments to the Miami-Dade's Plan are "in compliance" as defined in section 163.3184(1)(b), Fla. Stat. On December 16, 2003, the ALJ granted Monroe County's petition to intervene. On March 22, 2004, Miami-Dade filed a motion to relinquish jurisdiction to DCA. In December 2004, the parties reached a tentative settlement agreement, but the Board of County Commissioners of Miami-Dade County formally rejected the agreement on March 1, 2005. On April 11, 2005, City of Homestead filed its petition for leave to intervene (in support of Miami-Dade); DOAH granted the petition on May 4, 2005. On May 11, 2005, Petitioners filed their response to Miami-Dade's motion to relinquish jurisdiction; the response was adopted by Monroe County. On June 3, 2005, DCA filed its response to Miami-Dade's motion to relinquish jurisdiction, asking the ALJ to deny the motion. The case is set for final hearing on September 19 through 23 and 26 through 30, 2005. (Legal services are being provided by Morgan & Hendrick without charge to Monroe County).

**Smart Planning and Growth Coalition v. Monroe County (Circuit Court Case No. 03-CA-507-P)** - SPGC challenged NROGO, alleging that the allocations violated NROGO/Comp Plan provisions

because Key Largo CommuniKeys Master Plan had not yet been adopted. Case was dismissed by DOAH for lack of jurisdiction. SPGC filed action in circuit court on same grounds. County prevailed on its motion to dismiss for lack of jurisdiction on grounds that SPGC is not an "aggrieved party," as required by section 163.3215, *Florida Statutes*. SPGC filed an amended complaint on February 20, 2004. County filed its answer on March 5, 2004. On July 29, 2004, Judge Payne entered an order granting Lee Rohe's motion to withdraw as counsel for Petitioners; the order required Petitioner to obtain substitute counsel within 30 days or face dismissal. No attorney subsequently entered an appearance on behalf of Petitioners.

On June 9, 2005, Judge Payne entered verbatim a proposed order submitted by the County dismissing the case with prejudice. ($479.49 as of May 31, 2005).